Supreme Court, U.S.
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In The

Supreme Court of the United States

RICHARD and MARY ROES,
Nos. 2, 7, 8, 12 and 21,

Petitioners,

v.

UNITED STATES OF AMERICA
and BDO SEIDMAN, LLP,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In this case, the Seventh Circuit Court of Appeals affirmed the District Court's order enforcing an Internal Revenue Service summons served upon an accounting firm, BDO Seidman, LLP, requiring that firm to produce its list of clients to whom it gave advice regarding certain transactions.

The question presented is: Whether, notwithstanding the statutory accountant-client privilege or the common-law attorney-client privilege, the Internal Revenue Service can compel accountants or lawyers to identify their otherwise unknown clients whom they advised about transactions which the Internal Revenue Service suspects might be "potentially abusive tax shelters" where disclosure of the clients' identities would reveal their motive for seeking such advice and/or the substance of the advice given.

LIST OF PARTIES

Pursuant to Supreme Court Rule 14(1)(b), petitioners state that the parties before the Court are:

1) Richard and Mary Roes Nos. 2, 7, 8, 12 and 21
2) United States of America
3) BDO Seidman, LLP

The parties to the proceeding in the court of appeals whose judgment is sought to be reviewed are:

1) John and Jane Does
2) Richard and Mary Roes
3) United States of America
4) BDO Seidman, LLP

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PETITION FOR A WRIT OF CERTIORARI

Richard and Mary Roes Nos. 2, 7, 8, 12 and 21 respectively petition for a writ of certiorari to review the judgment of the Seventh Circuit Court of Appeals in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. at 1) is reported at 337 F.3d 802 (7th Cir. 2003). The original opinion of the district court is unreported. The opinion of the district court upon limited remand from the court of appeals is reported at 2003 WL 932365 (N.D. Ill. 2003).

JURISDICTION

The court of appeals issued its judgment on July 23, 2003, and denied rehearing on August 26, 2003. Pet. App. at 20. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

26 U.S.C. § 7525:

> With respect to tax advice, the same common law protections of confidentiality which apply to communications between a taxpayer and an attorney shall also apply to a communication between a taxpayer and any federally authorized tax practitioner to the extent the communication

would be considered a privileged communication if it were between a taxpayer and an attorney.

STATEMENT

The identity privilege at issue in this case arises in the context of an Internal Revenue Service ("IRS") investigation of professional advisors, including law firms and accounting firms, which rendered advice concerning certain financial transactions which the IRS believes might be "potentially abusive tax shelters." As part of that investigation, the IRS issued summonses to the public accounting firm of BDO Seidman, LLP. ("BDO"), seeking to discover the identity of any client of BDO whom BDO advised to engage in certain defined "Transactions." The Petitioners Roes herein (collectively, "Roes") were clients who sought advice from BDO in connection with the potential tax consequences of certain proposed financial transactions. Pet. App. at 3-5.

The stated purpose of the IRS investigation in this case was to determine the potential liability of BDO – not the clients themselves. The IRS is investigating possible violations of certain registration and disclosure requirements which apply to particular types of *potentially abusive* tax shelter transactions. Pet. App. at 3. The summons enforcement proceeding below arises out of an ongoing dispute between BDO and the IRS regarding whether the defined transactions are in fact "potentially abusive tax shelters" within the scope of the registration and listing requirements of 26 U.S.C. §§ 6111 and 6112. Failure to comply with the registration and listing requirements of §§ 6111 and 6112 can lead to the imposition of penalties. *See* 26 U.S.C. §§ 6707, 6708.

Section 6112 requires that any person who "organizes" or "sells" an interest in any "potentially abusive tax shelter" maintain a list of every person participating in such a transaction and provide that information to the IRS upon its request. A "potentially abusive tax shelter" is defined as (1) any tax shelter covered by § 6111's registration requirements, or (2) any transaction which is so defined by an IRS regulation. § 6112(b). The enforcement proceedings below are the result of an investigation initiated by the IRS regarding *BDO Seidman's* potential liability for violations of §§ 6111 and 6112. The investigation does not relate to any potential liability of the Roes. *See* §§ 6707 and 6708 (regarding a *promoter*'s liability for violations of §§ 6111/6112).

As stated in the Seventh Circuit's opinion, the IRS only "*suspected*" that BDO had violated §§ 6707 and 6708. Pet. App. at 3. There is no evidence of record that any of the transactions in which BDO advised the Roes to engage, or any of the "Transactions" defined in the IRS summonses, actually are "potentially abusive tax shelters" within the scope of either § 6111 or § 6112.

Each of the summonses issued by the IRS is virtually identical except for the definition of the "Transaction" to which it applies. Although the term "transaction" usually denotes objective criteria, that was not the case as the term was used in these summonses. Instead, the particularly defined "Transactions" were defined by reference to *the advice given* to the BDO client. For example, one "Transaction" was defined by whether BDO's "representations to its clients" would cause those clients to conclude that certain tax savings were likely. R. 3, Exh. 19, p. 3. Other "Transactions" were defined by reference to BDO's

"strategies" and "solutions" and whether they were "structured to produce" certain "intended results." *Id.*, at Exhs. 18 and 20, p. 3. In yet another summons, the "Transaction" was defined by whether the "arrangements" were "designed to produce" certain tax results. *Id.*, at Exh. 8, referring to IRS Notice 2000-44 (2000-2 C.B. 255).

The Roes (along with the Does, collectively referred to as the "Does" in the Seventh Circuit Opinion) attempted to intervene in the underlying enforcement action in the district court to assert their statutory tax advisor-client privilege with respect to the documents sought. The Roes argued to the district court that, because the documents would disclose their identities, they would by necessity also disclose their *motivation* for seeking BDO's tax advice – that is, their desire to obtain advice about tax-beneficial transactions, such as those now being investigated by the IRS. This disclosure would violate the identity privilege.

The district court summarily rejected the Roes' claim of privilege and denied their motions to intervene. The Roes immediately appealed. After a limited remand for the purpose of permitting specific factual findings to be made, the Seventh Circuit issued a decision affirming the denial of the motions to intervene on two grounds – neither of which relied on any of the findings made on remand. First, the court held that disclosure of the Roes' identities would not violate the privilege because the disclosure would not reveal any confidential communications between the client and tax advisor. Pet. App. at 16. Second, and "more fundamentally," the court held that the Roes had no expectation of confidentiality in their identities because the court believed that "BDO was obligated to disclose the identity of clients engaging in *such* financial transactions," *i.e.*,

"potentially abusive" tax shelters within the meaning of § 6112. *Id.* at 16-17 (emphasis added).

REASONS FOR GRANTING THE PETITION

The decision below creates a conflict between the Seventh Circuit and the Third Circuit regarding the applicability of the attorney-client privilege or the privilege under 26 U.S.C. § 7525 as to the "identity privilege" when the IRS seeks the identities of clients of a law firm or accounting firm based upon a description of the advice given to the client.

The decision below also will have a significant adverse impact on the applicability of the attorney-client privilege in the context of future IRS investigations. It does great damage to the traditional attorney-client privilege, especially in the area of the well-established "identity privilege."

Moreover, the decision below was incorrect in view of the statutory and case law to be applied and the state of the record.

I. A Conflict Exists Between The Third And Seventh Circuits Over Whether Clients' Identities Are Privileged When The IRS Is Aware Of The Substance Of The Privileged Communications.

The result of the Seventh Circuit's decision in this case is that lawyers can be compelled to "target" their clients for strict governmental scrutiny by not only disclosing their identities but also, in the course thereof, advising governmental authorities that these clients *should* be

regarded as "suspects" of illegal activities. Certiorari is warranted because that decision of the Seventh Circuit is in conflict with decisions recognizing the "identity privilege," including the Third Circuit's decision in *United States v. Liebman*, 742 F.2d 807, 809 (3d Cir. 1984) – a virtually identical case which the Seventh Circuit did not even cite, let alone discuss or distinguish.

The so-called "identity privilege" is somewhat of a misnomer. Actually, it is a specific application of the attorney-client privilege applicable by analogy to the statutory tax advisor-client privilege at issue here. Under 26 U.S.C. § 7525, the confidential communication of tax advice between a tax practitioner (such as BDO) and its client is protected as if the communication were between a lawyer and a client:

> With respect to tax advice, the same common law protections of confidentiality which apply to communications between a taxpayer and an attorney shall also apply to a communication between a taxpayer and any federally authorized tax practitioner to the extent the communication would be considered a privileged communication if it were between a taxpayer and an attorney.

26 U.S.C. § 7525(a)(1).

A client's identity ordinarily is not privileged information. *United States v. Liebman*, 742 F.2d 807 (3d Cir. 1984); *In re Grand Jury Proceedings* (*Cherney*), 898 F.2d 565 (7th Cir. 1990); *Tillotson v. Boughner*, 350 F.2d 663 (7th Cir. 1965). However, if compelled disclosure of the client's identity would reveal the client's motive for seeking the lawyer's (or tax advisor's) aid in the first place, then the privilege protects against such a disclosure. *See id.*

In *Liebman*, the IRS served a summons on a law firm specializing in tax law. *Id.* at 808. The law firm provided advice to clients regarding investments in real estate tax shelters, as well as the deductibility of fees paid in connection with those investments. *Id.* The IRS summons requested that the law firm identify all clients to whom it provided advice regarding those deductibility issues. *Id.* The law firm responded by asserting the attorney-client privilege against the disclosure of that client-identifying information. *Id.*

The Third Circuit agreed that the clients' identities were privileged in view of the way in which the summons was written and the fact that the IRS already knew the substance of the communications between the law firm and the clients. The summons specifically requested the law firm to identify clients who had been provided advice with respect to the deductibility of those fees. The advice in *Liebman* was that "taxpayers ... were advised by Liebman and Flaster that the fee was deductible for tax purposes." *Id.* at 809. The disclosure of the clients' "identity, when combined with the substance of the communications as to deductibility that is already known [by the IRS], would provide all there is to know about a confidential communication between the taxpayer-client and the attorney." *Id.* at 810.

Likewise, the IRS in this case issued summonses seeking the identity of clients whom BDO advised about the deductible nature of the specifically defined "Transactions." Clearly, the IRS already knew the substance of BDO's communications with its clients, as in *Liebman*, and is looking only to link that knowledge with the actual identities of the clients involved. The summonses defined the subject "Transactions" in great detail and in a manner

making it clear that the IRS already knew, through information furnished by other, non-intervening clients of BDO (similar to what happened in *Liebman*), the substance of the tax advice given (*i.e.*, the deductible nature of the Transactions). *See* R. 3, Exhs. 1-20.

The Seventh Circuit's decision ignores *Liebman* entirely, and it attempts to distinguish its own precedent in just three sentences:

> Disclosure of the identities of the Does will disclose to the IRS that the Does participated in one of the 20 types of tax shelters described in its summonses. *It is less than clear, however, as to what motive, or other confidential communication of tax advice, can be inferred from that information alone.* Compared to the situations in the *Tillotson* and *Cherney* cases, where the Government already knew much about the substance of the communications between the attorney and his unidentified client, in this case the IRS knows relatively little about the interactions between BDO and the Does, the nature of their relationship, or the substance of their conversations.

Pet. App. at 16 (emphasis added).

The purported distinction offered by the Seventh Circuit ignores the fact that the *only* reason BDO would be able to identify its clients as having engaged in the defined transactions is *because* its clients engaged BDO to advise those specific clients about *those* transactions and *because* BDO and its clients communicated about *those* transactions. Absent the privileged communications between BDO and its clients on those topics, BDO would not have any information sought by the summonses.

Contrary to the court's unexplained conclusion, the IRS already knew everything about the nature and substance of the relationships between BDO and its clients that was needed to trigger the applicability of the identity privilege. The IRS certainly had as much of that background information here as the government had in *Liebman*. In particular, as described above, the government already knew that BDO was advising clients to engage in the specifically-defined "Transactions." Indeed, the government defined those "Transactions," not in objective terms, but by specific reference to the communications which occurred between those clients and BDO. It is submitted that the Third Circuit decision in *Liebman* is in direct conflict with the Seventh Circuit's decision in this case.

II. The Decision Below Does Great Damage To The Attorney-Client Privilege.

Although this case involves the statutory tax advisory-client privilege, the decision below is especially troubling because of its potentially adverse effect on the attorney-client relationship in general. By analogy, the Seventh Circuit decision would arguably allow the government to obtain client lists from lawyers based solely on those lawyers' known areas of practice or expertise. Whether the lawyer is known to represent clients with white-collar criminal concerns, with antitrust concerns, with tax concerns, or on down the list, one can be assured that there will be a government agency extremely interested in knowing who that lawyer represents. This is no Orwellian fantasy. The logical extension of the Seventh Circuit's decision is that the very fact that a client seeks professional advice will become sufficient to target that

client for further scrutiny – as it has proven to be the case here.

In fact, the IRS has already, subsequent to the Seventh Circuit's decision, filed suit seeking the same type of information from two well-known law firms, Jenkins & Gilchrist and Sidley, Austin, Brown & Wood. *See United States v. Jenkins & Gilchrist*, Docket No. 03 C 5693 (N.D. Ill.); *In the Matter of the Tax Liabilities of John Does, etc.*, Docket No. 03 C 7226 (N.D. Ill.).

III. The Decision Below Is Clearly Incorrect.

As stated above, the Seventh Circuit issued a decision affirming the denial of the motions to intervene on two grounds – neither of which relied on any of the findings made on limited remand. First, the court held that disclosure of the Roes' identities would not violate the privilege because the disclosure would not reveal any confidential communications between the client and tax advisor. Pet. App. at 16. Second, and "more fundamentally," the court held that the Roes had no expectation of confidentiality in their identities because the court believed that "BDO was obligated to disclose the identity of clients engaging in *such* financial transactions," *i.e.*, "potentially abusive" tax shelters within the meaning of IRC § 6112. *Id.* at 16-17 (emphasis added).

In the case of *In re Grand Jury Proceedings (Cherney)*, 898 F.2d 565 (7th Cir. 1990), the government subpoenaed a lawyer for documents and testimony regarding the identity of a client who was paying the legal fees of another client in connection with a drug conspiracy trial. The unidentified client had also consulted with the lawyer about his own alleged involvement in the drug conspiracy.

The court ruled that the client's identity was privileged because revealing his identity would have the same effect as revealing his motive for consulting with the lawyer:

> A client's motive for seeking legal advice is undeniably a confidential communication. Accordingly, the privilege protects an unknown client's identity where its disclosure would reveal a client's motive for seeking legal advice . . . In the situation at bar, the fee payer sought legal advice concerning his involvement in the drug conspiracy. Disclosure of the fee payer's identity would necessarily reveal the client's involvement in that crime and thus reveal his motive for seeking legal advice in the first place.

898 F.2d at 568 (omitting citations).

In *Tillotson v. Boughner*, 350 F.2d 663 (7th Cir. 1965), the unidentified client retained a tax attorney in connection with his prior filing of inaccurate tax returns. On the client's behalf, the lawyer sent a check to the IRS covering the amount of the unpaid taxes but not identifying the client (presumably to stop the accrual of interest and penalties, should the client later be independently identified through an audit). The court held that the client's identity was protected under the attorney-client privilege under those circumstances because disclosing the client's identity "would lead ultimately to disclosure of the taxpayer's motive for seeking legal advice." 350 F.2d at 666.

It is submitted that the IRS in this case was aware of at least as much of the privileged communication as it was in *Liebman*, *Tillotson* and *Cherney*. The Seventh Circuit's opinion concedes that disclosure of the identities of the Roes will disclose to the IRS that the Roes participated in one of the twenty types of tax shelters described in the

summons. Pet. App. at 16. This is almost identical to the privileged communications involved in the *Liebman* case (whether to claim identified deductions) and very similar to the privileged communications in *Tillotson* (taxpayer's tax liability) and *Cherney* (involvement in a crime).

Moreover, the court's second basis for affirmance – that the client's identities were required to be disclosed by § 6112 and, therefore, there could be no expectation of confidentiality – rests on a fundamental misunderstanding of the record on appeal and seriously erodes the efficacy of the privilege. Specifically, the court held that *because* "BDO was obligated to disclose the identity of clients" under § 6112, the Roes could not have expected their identities to remain confidential. Pet. App. at 16-17. The premise of that conclusion, however, has no basis in fact. Section 6112 has *never* been shown to apply to the types of transactions in which BDO advised its clients to engage. There has been no determination by the district court or any other court that those transactions fit within the definition of "potentially abusive tax shelters" subject to the statutory registration and disclosure requirements. The circuit court decision nevertheless pre-judges the very controversy between the IRS and BDO in finding that the transactions were subject to disclosure.

Moreover, nothing in the text or legislative history of § 6112 (or its counterpart § 6111) suggests that it is intended to trump any privilege which Congress created under § 7525. To the contrary, the Treasury Regulations addressing the disclosure requirements under those provisions explicitly recognize that they are *limited* by the § 7525 privilege:

> In any case in which an organizer or a seller of a potentially abusive tax shelter believes that information required to be maintained as part of the list for that tax shelter . . . constitutes confidential tax advice *protected under section 7525(a)*, such information may be withheld from the Service, [provided the promoter provides a sworn statement so stating].

Temp. Treas. Reg. § 301.6112-1T Q&A-17(b) (2002) (emphasis added); *see also* Temp. Treas. Reg. § 301.6111-2T(e)(3) (2003) (relating to claims of § 7525 privilege in connection with § 6111 disclosure requirements).

Even though the mandate of the Seventh Circuit has already issued, this appeal is not moot. *Church of Scientology v. United States*, 506 U.S. 9 (1992).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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337 F.3d 802

UNITED STATES of America,
Petitioner-Appellee,

v.

BDO SEIDMAN, regarding promoter examination of BDO Seidman,
Respondent-Appellee.

Appeals of: John Doe and Jane Doe and Richard Roe and Mary Roe,
Proposed Intervenors.

Nos. 02-3914, 02-3915.

United States Court of Appeals,
Seventh Circuit.

Argued May 30, 2003.

Decided July 23, 2003.

Rehearing and Suggestion for Rehearing
En Banc Denied Aug. 26, 2003*.

Kenneth W. Rosenberg, Frank P. Cihlar (argued), Dept. of Justice, Tax Div., Appellate Section, Washington, DC, for Petitioner-Appellee.

Donald R. Cassling, Jenner & Block, Chicago, IL, Peter Buscemi (argued), Morgan, Lewis & Bockius, Washington, DC, for Respondent-Appellee.

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* The Honorable Joel M. Flaum, Chief Judge, did not participate in the consideration of the suggestion for rehearing en banc.

Joseph J. Duffy, Corey B. Rubenstein (argued), Stetler & Duffy, Chicago, IL, Royal B. Martin, Jr., Martin, Brown & Sullivan, Chicago, IL, for Appellants.

Before RIPPLE, KANNE and WILLIAMS, Circuit Judges.

RIPPLE, Circuit Judge.

Several unnamed clients of BDO Seidman, LLP ("BDO"), a public accounting and consulting firm, appeal from the district court's denial of their motions to intervene in an Internal Revenue Service ("IRS") enforcement action against BDO.

The IRS had issued twenty summonses to BDO as part of its investigation of BDO's compliance with Internal Revenue Code registration and list-keeping requirements for organizers and sellers of potentially abusive tax shelters. *See* 26 U.S.C. §§ 6111, 6112. The clients sought to intervene to assert a confidentiality privilege regarding certain documents that BDO intended to produce in response to those summonses. The clients argued that, because these documents reveal their identities as BDO clients who sought advice regarding tax shelters and who subsequently invested in those shelters, disclosure inevitably would violate the statutory privilege protecting confidential communications between a taxpayer and any federally authorized tax practitioner giving tax advice. *See* 26 U.S.C. § 7525. For the reasons that follow, we affirm the district court's denial of the clients' motions to intervene.

I

BACKGROUND

A. The Enforcement Action

In September 2000, the IRS received information suggesting that BDO was promoting potentially abusive tax shelters without complying with the registration and listing requirements for organizers and sellers of tax shelters. *See* 26 U.S.C. §§ 6111, 6112. Section 6111(a) of the Internal Revenue Code requires organizers of tax shelters to register the tax shelter with the IRS. *See* 26 U.S.C. § 6111(a). Any tax shelter required to be registered under § 6111, as well as any "arrangement which is of a type which the Secretary determines by regulations as having a potential for tax avoidance or evasion," is considered to be "potentially abusive." 26 U.S.C. § 6112(b). Accordingly, the organizers and sellers of such tax shelters must keep a list identifying each person to whom an interest of the tax shelter was sold. *See* 26 U.S.C. § 6112(a). Failure to comply with the registration and listing requirements of § 6111 and § 6112 can lead to the imposition of penalties. *See* 26 U.S.C. §§ 6707, 6708. Because the IRS suspected that BDO had violated these statutory provisions by organizing and selling interests in potentially abusive tax shelters without complying with the registration and list-keeping requirements, it issued a series of summonses to BDO, identifying twenty types of tax shelter transactions in which it suspected that BDO's clients had invested.

The summonses command production of documents and testimony relating to the identified transactions, as well as information about BDO clients who invested in the identified tax shelters. For example, the summonses

demand documents identifying the investors in the transactions, the date on which those investors acquired an interest, and all tax shelter registrations filed and investor lists prepared with respect to the transactions.

In July 2002, when BDO failed to produce documents as required by the summonses, the IRS petitioned the district court for enforcement. BDO opposed enforcement. It argued that the investigation did not have a legitimate purpose, that the summonses were overbroad and issued in bad faith, and that the information sought was already in the possession of the IRS and was not relevant to the investigation. BDO also claimed that some of the summoned information was protected from disclosure by the attorney-client privilege, the work product doctrine, and the confidentiality privilege of § 7525 of the Internal Revenue Code. In October 2002, the district court ruled that the IRS had met its burden of showing that it issued the summonses in good faith, and that BDO had failed to show that enforcement of the summonses would constitute an abuse of process. *See United States v. BDO Seidman, LLP,* 225 F.Supp.2d 918, 920 (N.D.Ill.2002). The district court then directed BDO to produce, on or before November 4, 2002, all responsive documents except those that BDO previously had listed on privilege logs and submitted to the court for an *in camera* review.

B. The Motions to Intervene

Among the responsive documents not previously submitted for the court's *in camera* inspection were records that reveal the identities of the BDO clients who invested in at least one of the 20 types of tax shelters identified in the summonses. BDO informed its clients

that it intended to produce these documents to the IRS. In response, two sets of unidentified taxpayers – the John and Jane Does and the Richard and Mary Roes (hereinafter referred to collectively as "the Does") – filed emergency motions to intervene in the enforcement proceedings pursuant to Federal Rule of Civil Procedure 24(a)(2). The Does, asserting that they are BDO clients who sought BDO's confidential advice regarding the potential tax effects of certain proposed financial transactions, argued that the documents revealing their identities are privileged under 26 U.S.C. § 7525, and that BDO was not adequately representing their interest in keeping that information confidential. The Does conceded that, aside from the fact that the documents reveal their identities as BDO clients who invested in at least one of the 20 types of tax shelters described in the summonses, the documents themselves do not contain any otherwise privileged communication. After a hearing, the district court denied the Does' emergency motions to intervene. The court concluded that information regarding a client's identity falls outside the scope of the § 7525 privilege. Because the district court did not believe that the Does would have a likelihood of success on the merits of an appeal, it denied the Does' motion for a stay of its enforcement order.

The Does filed timely notices of appeal from the denial of their motions to intervene and requested that this court stay the production of the documents to which they had asserted a privilege in the district court. We granted a temporary stay and remanded the case to the district court for the limited purpose of permitting the district court to enter more extensive findings regarding those documents to which the Does claim a privilege. The remand order directed the district court to perform an *in camera*

inspection of the documents at issue and to enter specific findings considering the totality of the circumstances surrounding the Does' privilege claim.

C. The Limited Remand

On this limited remand, the district court did not perform a comprehensive review of all the documents that contained information identifying the Does, but instead requested counsel to produce a subset for *in camera* inspection. Specifically, the court ordered counsel to produce all confidentiality agreements, consulting agreements and engagement letters entered into between BDO and the Does. Upon reviewing this subset of documents, the court determined that the identities of at least 55 Does were not subject to privilege under § 7525. It noted that many of the confidentiality agreements establish that particular Does engaged BDO's services, in part, for the purpose of preparing income tax returns. In addition, several consulting agreements contained a "No Warranty" provision, which states that "BDO's Services hereunder do not include . . . any legal and/or tax opinions regarding any strategies that may be implemented." *See United States v. BDO Seidman, LLP,* No. 02 C 4822, 2003 WL 932365, at *3 (N.D.Ill. Feb.5, 2003). This language, the court determined, suggests that the relationship between BDO and the Does was not always that of tax advisor-client and that, in such cases, their communications would not be subject to the § 7525 privilege. *See id.* at *3-4. Accordingly, the district court found that 133 of the documents it had reviewed established that BDO's communications with 55 Does had not been for the purpose of providing tax advice, and were therefore not privileged. Furthermore, the court concluded, 28 of the documents were generated for the

purpose of preparing tax returns, another unprivileged category of communication. *See id.* at *2 (citing *United States v. Frederick,* 182 F.3d 496 (7th Cir.1999)). Finally, with respect to 30 unidentified clients who sought intervention, the court was unable to make findings because no confidentiality agreements, consulting agreements or engagement letters had been produced on their behalf.

II

DISCUSSION

On appeal, the Does submit that the district court erred when it denied their motions to intervene on the ground that the Does lacked a colorable claim of privilege under § 7525. Because the Does sought intervention as of right, Fed.R.Civ.P. 24(a)(2), they had the burden of establishing that: (1) their motions to intervene were timely; (2) they possess an interest related to the subject matter of the enforcement action; (3) disposition of the action threatens to impair that interest; and (4) the IRS and BDO fail to represent adequately their interest. *See Vollmer v. Publishers Clearing House,* 248 F.3d 698, 705 (7th Cir.2001). To satisfy these requirements, the Does must show that the "interest" asserted is a "direct, significant, legally protectable" one. *Sec. Ins. Co. of Hartford v. Schipporeit,* 69 F.3d 1377, 1380 (7th Cir.1995) (citation omitted). A colorable claim of privilege could constitute a legally protectable interest sufficiently significant to warrant intervention as of right, assuming that the three remaining factors are also satisfied. *See In re Grand Jury Subpoena,* 274 F.3d 563, 570 (1st Cir.2001). Failure to satisfy any one of the four intervention factors is sufficient grounds to deny the intervention. *See Vollmer,* 248 F.3d at 705. This court reviews the foregoing factors de novo, with

the exception of the first factor – the timeliness of the intervention – which this court reviews for abuse of discretion. *Id.* at 705-06; *Nissei Sangyo Am., Ltd. v. United States,* 31 F.3d 435, 438 (7th Cir.1994).

Before us, the only factor that the IRS disputes is whether the Does satisfied their burden of demonstrating a legally protectable interest in preventing the disclosure of the documents that would reveal their identities as individuals who sought BDO's advice regarding tax shelters.

In the course of their submission, the Does advance several additional arguments that challenge the district court's findings and conclusions on limited remand. For example, they argue that the district court's factual findings were clearly erroneous because the court failed to consider the totality of the circumstances surrounding each document. They further argue that the district court erroneously concluded that the asserted privilege would not have attached even if the court properly found that BDO prepared tax returns for some unidentified clients who discussed tax shelters with BDO. Finally, the Does contend that there is no basis to uphold the district court's production order with respect to the 30 unidentified clients for whom no findings were made on the limited remand. These arguments all presuppose that the district court erroneously concluded that the § 7525 privilege cannot be asserted to prevent the disclosure of their identities. If that initial premise proves wrong, there would be no reason to address any of these arguments.

We have jurisdiction to review the district court's orders because they definitively preclude the Does' future participation in the IRS enforcement action against BDO.

See United States v. City of Milwaukee, 144 F.3d 524, 528 (7th Cir.1998); *Williams v. Katz,* 23 F.3d 190, 191-92 (7th Cir.1994).

A. A Colorable Claim of Privilege

The primary issue before us is whether the district court erred when it denied the Does' motions to intervene because it believed that they had failed to establish a colorable claim of privilege under § 7525. Unless the Does can establish that the § 7525 privilege can protect a taxpayer's identity from disclosure in the IRS enforcement action, the Does will not prevail on appeal. Whether the scope of the § 7525 privilege includes protection against the disclosure of client identity is a question of law that this court reviews de novo. *See In re Subpoenaed Grand Jury Witness,* 171 F.3d 511, 512 (7th Cir.1999).

1. Regulatory Context

We first consider the regulatory context in which the Does' claim of privilege arises. The Does sought to intervene in proceedings involving the IRS investigation of BDO for potential violations of the tax code, including the provisions requiring organizers of tax shelters to register tax shelters with the IRS, 26 U.S.C. § 6111, and organizers and sellers of such shelters to keep lists of the investors, 26 U.S.C. § 6112. These provisions were enacted by Congress as part of the Deficit Reduction Act of 1984, Pub.L. No. 98-369, 98 Stat. 494 (1984), for the purpose of providing the IRS with means to better monitor tax shelters, and, consequently, to deter abusive tax shelters that can adversely impact public revenues. *See* Elizabeth K. Lewicki, *The Regulation of Tax Shelters and New Internal*

Revenue Code Section 469: A Complex and Unnecessary Addition to the War on Abusive Tax Shelters, 19 Pac. L.J. 101, 115-16 (1987). Before 1984, no systematic information was available to assist the IRS in identifying the shelters that should be investigated. H.R. Conf. Rep. No. 98-861, at 977 (1984), *reprinted in* 1984 U.S.C.C.A.N. 1445, 1665. The IRS could audit individual taxpayers, but such a process only randomly identified participants in potentially abusive tax shelters. *Lewicki,* 19 Pac. L.J. at 116. The statutory registration and list-keeping provisions allow the IRS to identify more easily those transactions that it deems to be abusive and "to identify quickly all of the participants in related tax-shelter investments." H.R.Rep. No. 98-432, pt. 2, at 1351-52 (1984), *reprinted in* 1984 U.S.C.C.A.N. 697, 1004-05. These provisions also enable the IRS to examine every purchaser of a given type of tax shelter investment and to treat those taxpayers in a more uniform manner. *Id.*

Congress, by granting the IRS the broad power to issue summonses to investigate violations of the tax code, *see* 26 U.S.C. § 7602, further provides the IRS with great latitude to verify compliance with these tax shelter registration and list-keeping provisions. *See also Holifield v. United States,* 909 F.2d 201, 205 (7th Cir.1990). Nevertheless, despite these powerful investigative tools, the IRS' investigatory power is not absolute. If a taxpayer fails to comply with a summons, the IRS must apply to the district court to secure an enforcement order. *See* 26 U.S.C. § 7604. Prior to enforcing tax summonses, the court must scrutinize them to determine whether they are made in good faith and seek information relevant to a legitimate investigative purpose. *See United States v. Powell,* 379 U.S. 48, 57-58, 85 S.Ct. 248, 13 L.Ed.2d 112 (1964); *Miller*

v. United States, 150 F.3d 770, 772 (7th Cir.1998). Once the Government makes a prima facie showing of good faith, the burden shifts to the respondent to show that the enforcement of the summons would constitute an abuse of process. *See 2121 Arlington Heights Corp. v. IRS,* 109 F.3d 1221, 1224 (7th Cir.1997). "Summons enforcement proceedings are intended to be summary in nature," and it is left to the district court's discretion to determine whether a hearing is necessary. *Id.* at 1226 (citations omitted).

The IRS' broad power to investigate possible violations of the tax laws is understood to be vital to the efficacy of the federal tax system, "which seeks to assure that taxpayers pay what Congress has mandated and to prevent dishonest persons from escaping taxation thus shifting heavier burdens to honest taxpayers." *United States v. Bisceglia,* 420 U.S. 141, 146, 95 S.Ct. 915, 43 L.Ed.2d 88 (1975). As the Supreme Court has noted, "the very language of § 7602 reflects . . . a congressional policy choice *in favor of disclosure* of all information relevant to a legitimate IRS inquiry." *United States v. Arthur Young & Co.,* 465 U.S. 805, 816, 104 S.Ct. 1495, 79 L.Ed.2d 826 (1984). Because the IRS' investigatory powers are essential to the proper functioning of the tax system, courts are reluctant to restrict the IRS' summons power, absent unambiguous direction from Congress. *See 2121 Arlington Heights,* 109 F.3d at 1225 (citations omitted). Nevertheless, a court's power to enforce a summons is not absolute; it is subject to traditional privileges. *Arthur Young & Co.,* 465 U.S. at 816, 104 S.Ct. 1495.

2. 26 U.S.C. § 7525

Having described the general framework of this regulatory authority, we now turn to the specific context of the Does' claim. The Does seek to intervene to prevent the disclosure, through IRS summonses, of documents that the Does contend are privileged. The Does' privilege claim rests entirely on § 7525, a statute enacted on July 22, 1998, to provide a confidentiality privilege for communications between a taxpayer and a tax practitioner. This limited privilege applies only to communications occurring after the date of the statute's enactment. *See Frederick,* 182 F.3d at 502. Section 7525, provides in pertinent part:

> With respect to tax advice, the same common law protections of confidentiality which apply to a communication between a taxpayer and an attorney shall also apply to a communication between a taxpayer and any federally authorized tax practitioner to the extent the communication would be considered a privileged communication if it were between a taxpayer and an attorney.

26 U.S.C. § 7525(a)(1). Thus the § 7525 privilege is no broader than that of the attorney-client privilege, and "[n]othing in [§ 7525] suggests that . . . nonlawyer practitioners are entitled to privilege when they are doing other than lawyers' work." *Frederick,* 182 F.3d at 502. Because the scope of the tax practitioner-client privilege depends on the scope of the common law protections of confidential attorney-client communications, we must look to the body of common law interpreting the attorney-client privilege to interpret the § 7525 privilege.

The attorney-client privilege is "one of the oldest recognized privileges for confidential communications" known to the common law. *Swidler & Berlin v. United*

States, 524 U.S. 399, 403, 118 S.Ct. 2081, 141 L.Ed.2d 379 (1998). The purpose of the privilege is to encourage full disclosure and to facilitate open communication between attorneys and their clients. *Id.* However, because "the privilege has the effect of withholding relevant information," courts construe the privilege to apply only where necessary to achieve its purpose. *Fisher v. United States,* 425 U.S. 391, 403, 96 S.Ct. 1569, 48 L.Ed.2d 39 (1976); *see In re Grand Jury Proceeding (Cherney),* 898 F.2d 565, 567 (7th Cir.1990). The mere assertion of a privilege is not enough; instead, a party that seeks to invoke the attorney-client privilege has the burden of establishing all of its essential elements. *See In re Grand Jury Proceedings (Thullen),* 220 F.3d 568, 571 (7th Cir.2000); *United States v. Evans,* 113 F.3d 1457, 1461 (7th Cir.1997).

A party that seeks to assert a § 7525 privilege bears the same burden. Among the essential elements of the attorney-client privilege are the requirements that the communication be made to the attorney in confidence, *see Thullen,* 220 F.3d at 571, and that the confidences constitute information that is not intended to be disclosed by the attorney, *see United States v. Weger,* 709 F.2d 1151, 1154 (7th Cir.1983) ("the privilege protects only the client's confidences, not things which, at the time, are not intended to be held in the breast of the lawyer") (citation omitted); *In re Grand Jury Proceedings,* 727 F.2d 1352, 1356 (4th Cir.1984) ("[C]ourts have consistently 'refused to apply the privilege to information that the client intends his attorney to impart to others . . . ,' or which the client intends shall be published or made known to others.") (collecting cases). Furthermore, the party asserting a privilege must show that the attorney-client communication was made for the purpose of obtaining legal advice, or,

more precisely in the case of the § 7525 privilege, tax advice. *See Thullen,* 220 F.3d at 571.

The attorney-client privilege protects confidential *communications* made by a client to his lawyer, and so ordinarily the identity of a client does not come within the scope of the privilege. *Tillotson v. Boughner,* 350 F.2d 663, 666 (7th Cir.1965). However, over the years, a limited exception to this general rule has developed; the identity of a client may be privileged in the rare circumstance when so much of an actual confidential communication has been disclosed already that merely identifying the client will effectively disclose that communication. *See In re Subpoenaed Grand Jury Witness,* 171 F.3d at 514; *Cherney,* 898 F.2d at 568; *In re Witnesses Before the Special March 1980 Grand Jury,* 729 F.2d 489, 494 (7th Cir.1984); *Tillotson,* 350 F.2d at 666.

In their discussion of this narrow exception, the parties primarily focus on two cases in which we held that attorney-client privilege could prevent the disclosure of a client's identity. In *Tillotson,* an unidentified taxpayer had determined that he understated his tax liability on previously filed returns and retained an attorney to deliver a cashier's check in the amount of $215,499.95 to the IRS. 350 F.2d at 663-65. The IRS sought to enforce a summons it had served on the attorney, demanding that he testify about his client. The attorney asserted the attorney-client privilege and refused to disclose his client's identity. *Id.* We upheld the invocation of the privilege because "under the peculiar facts of this case, the attorney-client privilege includes, within its scope, the identity of the client." *Id.* at 665. We reasoned that the IRS had become aware of the substantive content of the confidential communication between the unknown taxpayer and his attorney – namely,

the taxpayer's tax liability – the moment the cashier's check was delivered. Because revealing the taxpayer's identity would also reveal the content of the confidential communication, the privilege attached. *Id.* at 666. Similarly, in *Cherney,* we held that the privilege encompasses the identity of a client when the Government knows that the unidentified client paid fees for a criminal defendant out of concern about his own involvement in the charged drug conspiracy. 898 F.2d at 568. In that case, we explained, the client's identity was privileged "because its disclosure would be tantamount to revealing the premise of a confidential communication: the very substantive reason that the client sought legal advice in the first place." *Id.* In other words, "the privilege protects an unknown client's identity where its disclosure would reveal a client's motive for seeking legal advice." *Id.; see In re Subpoenaed Grand Jury Witness,* 171 F.3d at 514; *Tillotson,* 350 F.2d at 666.

Relying on these cases, the Does submit that the IRS' summonses set forth such detailed descriptions about suspect types of tax shelters under investigation that any document produced in response that also reveals a client's identity will inevitably reveal that client's *motivation* for seeking tax advice from BDO. The Does define their "motive" for retaining BDO's services as the "desire to engage in financial transactions which the government might later decide to be questionable, or . . . 'potentially abusive.'" Appellants' Br. at 16. Because a client's "motive" for seeking legal advice is considered a confidential communication, the Does contend that the § 7525 privilege should protect against the disclosure of their motive for seeking tax advice, a motive that would be known if their identities are revealed.

The Does have not established that a confidential communication will be disclosed if their identities are revealed in response to the summonses. Disclosure of the identities of the Does will disclose to the IRS that the Does participated in one of the 20 types of tax shelters described in its summonses. It is less than clear, however, as to what motive, or other confidential communication of tax advice, can be inferred from that information alone. Compared to the situations in the *Tillotson* and *Cherney* cases, where the Government already knew much about the substance of the communications between the attorney and his unidentified client, in this case the IRS knows relatively little about the interactions between BDO and the Does, the nature of their relationship, or the substance of their conversations. Moreover, the Does concede that the documents that BDO intends to produce in response to the summonses are not subject to any other independent claim of privilege beyond the Does' assertion of privilege as to identity.

More fundamentally, the Does' participation in potentially abusive tax shelters is information ordinarily subject to full disclosure under the federal tax law. *See* 26 U.S.C §§ 6111, 6112. Congress has determined that tax shelters are subject to special scrutiny, and anyone who organizes or sells an interest in tax shelters is required, pursuant to I.R.C. § 6112, to maintain a list identifying each person to whom such an interest was sold. This list-keeping provision precludes the Does from establishing an *expectation of confidentiality* in their communications with BDO, an essential element of the attorney-client privilege and, by extension, the § 7525 privilege. *See Evans,* 113 F.3d at 1461. At the time that the Does communicated their

interest in participating in tax shelters that BDO organized or sold, the Does should have known that BDO was obligated to disclose the identity of clients engaging in such financial transactions. Because the Does cannot credibly argue that they expected that their participation in such transactions would not be disclosed, they cannot now establish that the documents responsive to the summonses, which do not contain any tax advice, reveal a *confidential* communication. *Thullen,* 220 F.3d at 571 (a communication must be made in confidence to be privileged under § 7525).

BDO's affirmative duty to disclose its clients' participation in potentially abusive tax shelters renders the Does' situation easily distinguishable from the limited circumstances in which we have determined that a client's identity was information subject to the attorney-client privilege. The district court committed no error when it concluded that the Does failed to establish a colorable claim of privilege under § 7525.

Conclusion

Because the Does cannot demonstrate a colorable claim of privilege, they have failed to establish a legally protectable interest in preventing the disclosure of the documents revealing their identities as individuals who participated in tax shelters promoted by BDO. For the reasons stated above, the district court's judgments denying the Does' motions for intervention are affirmed.

AFFIRMED.

United States District Court,
Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Milton I. Shadur	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	02 C 4822	**DATE**	11/1/2002
CASE TITLE	USA vs. BDO Seidman, LLP		

[In the following box (a) indicate the party filing the motion, e.g., plaintiff, defendant, 3rd party plaintiff, and (b) state briefly the nature of the motion being presented.]

MOTION:

Emergency Motion to intervene and emergency motion for modification of order

DOCKET ENTRY:

(1) ■ Filed motion of [use listing in "Motion" box above.]

(2) □ Brief in support of motion due ___.

(3) □ Answer brief to motion due ___. Reply to answer brief due ___.

(4) □ Ruling/Hearing on ___ set for ___ at ___.

(5) □ Status hearing [held/continued to] [set for/re-set for] on ___ set for ___ at ___.

(6) □ Pretrial conference [held/continued to] [set for/re-set for] on ___ set for ___ at ___.

(7) □ Trial [set for/re-set for] on ___ at ___.

(8) □ [Bench/Jury trial] [Hearing] held/continued to ___ at ___.

(9) ☐ This case is dismissed [with/without] prejudice and without costs [by/agreement/pursuant to]
☐ FRCP4(m) ☐ Local Rule 41.1
☐ FRCP41(a)(1) ☐ FRCP41(a)(2).

(10) ■ [Other docket entry] Motion denied for the reasons stated orally. Attorney Joe Duffy is granted leave to file under seal the identities of proposed intervenors.

(11) ☐ [For further detail see order (on reverse side of/attached to) the original minute order.]

	No notices required, advised in open court.		number of notices	Document Number
	No notices required.		NOV 4 2002 date docketed	
	Notices mailed by judge's staff.		CV docketing deputy initials	44
	Notified counsel by telephones.		date mailed notice	
✓	Docketing to mail notices.		mailing deputy initials	
	Mail AO 450 form.			
	Copy to judge/ magistrate judge.			
SN	courtroom deputy's initials	Date/time received in central Clerk's Office		

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

August 26, 2003

Before

Hon. KENNETH F. RIPPLE, *Circuit Judge*

Hon. MICHAEL S. KANNE, *Circuit Judge*

Hon. ANN CLAIRE WILLIAMS, *Circuit Judge*

UNITED STATES OF AMERICA, Petitioner-Appellee, Nos. 02-3914 and 02-3915 v. BDO SEIDMAN, regarding promoter examination of BDO Seidman, Respondent-Appellee. APPEALS OF: JOHN DOE and JANE DOE, and RICHARD ROE and MARY ROE, Proposed Intervenors.	Appeals from the United States District Court for the Northern District of Illinois, Eastern Division. No. 02 C 4822 James F. Holderman, *Judge* and Milton I. Shadur, *Judge*.

ORDER

Upon consideration of the Appellants' petition for rehearing *en banc*, filed on August 5, 2003, no judge in active service* has requested a vote thereon and the

* The Honorable Joel M. Flaum, Chief Judge, did not participate in the consideration of the suggestion for rehearing en banc.

judges on the original panel have voted to deny the petition. Accordingly,

IT IS ORDERED that the petition for rehearing *en banc* is hereby DENIED.